Atlas Concrete Construction Co., Inc., *and* General Drivers, Warehousemen and Helpers Union, Local Union No. 89, an affiliate of the International Brotherhood of Teamsters, AFL–CIO. Cases 9–CA–35198–2 and 9–CA–35410

September 1, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 22, 1998, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Atlas Concrete Construction Co., Inc., Crestwood, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Crestwood, Kentucky facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1997."

Andrew L. Lang, Esq., for the General Counsel.
Edwin S. Hopson, Esq. (Wyatt, Tarrant & Combs), of Louisville, Kentucky, for the Respondent.
Alton D. Priddy, Esq. (Hardy, Logan & Priddy), of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on April 7, 1998, in Louisville, Kentucky, upon a complaint issued on December 8, 1997. The charges filed by General Drivers, Warehousemen and Helpers Union, Local No. 89 accuse the Company, Atlas Concrete Construction Company, Inc., with refusing to execute a collective-bargaining agreement and with withdrawing its recognition of the Union as the employees' bargaining representative and with refusing to furnish the Union with information about its replacement employees. The Respondent's answer, timely filed, admitted all the jurisdictional allegations in the complaint, but it denied the substantive allegations that the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Upon consideration of the entire record in this case and having observed the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture and sale of concrete at its Crestwood, Kentucky facility. With purchases of goods valued in excess of $50,000 from points outside the State of Kentucky, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Atlas Concrete Construction Company and the Union were parties to a collective-bargaining agreement effective August 1, 1994, to March 31, 1997 (G.C. Exh. 2). The contract was extended during the subsequent negotiations. Following several unsuccessful bargaining sessions, the Company with the help of a mediator submitted to the Union a verbal proposal on July 28, 1997, contingent upon its ability to continue negotiations. The mediator, Larry Roberts, continued his efforts to mediate the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge rejected the Respondent's argument that it had made a conditional offer to the Union. In its exceptions, the Respondent claims that the Union was fully aware, during bargaining, that the Company had received a petition raising a doubt about the Union's continued majority status and that the Company's statement that its offer was contingent upon its ability to continue negotiations was linked to the petition. The judge found, however, based on credibility resolutions, that the Respondent informed the Union only that a "paper" had been served on it, and did not reveal the reasons for the contingency it placed on its offer. We adopt the judge's findings.

In adopting the judge's finding that the Respondent unlawfully refused to furnish requested information, we do not rely on the judge's finding that the Union needed the information to assess its bargaining position. Rather, we find that the information was necessary for the Union to perform its duties as collective-bargaining agent.

Finally, we shall modify par. 2(e) of the judge's recommended Order in accordance with *Excel Container*, 325 NLRB 17 (1997).

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

negotiations, and on August 1, 1997, the Respondent submitted a written offer contingent on the Company's continued ability to make an offer (G.C. Exh. 3). Upon receiving the company proposal, John Wientjes, the Union's negotiator, promised Tom Forshee, the Company's negotiator, that he would submit the proposal to the union membership for ratification. Forshee gave Wientjes the beeper number of Mike Fowler, a company representative, in order to inform the Company of the outcome of the ratification meeting. Forshee made it clear to the Union that "we'll see you on Monday" if the offer would be ratified (Tr. 24). The union membership voted to accept the Company's offer on August 1, 1997. Wientjes promptly informed Mike Fowler, the company operations manager, that the contract proposal had been accepted and that the employees would report for work on Monday. Fowler did not object. The Union also informed Larry Roberts that the offer had been accepted. However, when the employees reported for work on Monday, the Company refused to put them to work because it claimed that there was no work for them.

The Respondent did not disclose to the Union the reason for the contingency offers, although it had made a reference to a paper, which had been served on the Company. However, the Company refused to elaborate on the significance of the paper and the Union was kept in the dark about the fact that the paper was a petition from the employees, which ultimately provided the Company with a good-faith doubt about the Union's continued majority status.

The Respondent admittedly withheld certain information requested by the Union about the hiring of replacement workers.

Analysis

The General Counsel argues that the company offer of August 1, 1997, was accepted and ratified by the Union and effective on that date, even though the Respondent had made it clear that its offer was contingent upon its continued ability to continue the negotiations. The Company's refusal to honor the agreement, as well as its refusal to furnish certain information requested by the Union constitute, so argues the General Counsel, violations of Section 8(a)(1) and (5). The Respondent naturally argues that its offer was conditional based upon the continued majority status of the Union among the employees. When the Union was no longer supported by the majority of the employees, the Company did not have the capacity to enter into a collective-bargaining agreement.

The record is clear and the parties stipulated that the Respondent had a good-faith doubt as to the Union's continued majority status as of August 5, 1997, based upon a petition of employees (Tr. 8). It is also clear that the Company when making its verbal offer on July 28, 1997, and the written offer of August 1, 1997, had expressed through the mediator that the proposals were conditioned "on the Company's ability to continue negotiations with the Union" (Tr. 17, 42).

Although the Company had received a petition from the employees on July 28, 1997, it did not verify the accuracy of the signatures and the number of the employees on the petition until August 5, 1997, well after the Union had accepted the contract proposal.

The Respondent did not disclose to the Union during the negotiations on July 28 and August 1 that it had received a petition from the employees, even though the union negotiator, Wientjes, had inquired about the so-called paper. The Company reacted to the petition by merely telling the Union that the offer was contingent upon its continued ability to negotiate. Parenthetically, I find that the record does not support the Respondent's argument that the Company had referred to its "legal" ability to continue negotiations. The testimony of Tom Forshee and Carol Fowler, Respondent's chief financial officer, was initially consistent with Wientjes' version of the statement, although they subsequently testified that the Company has conditioned its offer on the legal ability to negotiate. I have credited the more reliable and consistent testimony of the three witnesses. The conclusions reached herein would not have been different even if the Respondent had had used the term "legal ability."

Both parties rely upon *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996), where the Court upheld the validity of a bargaining agreement which was negotiated while the union's majority status was an issue. The Court observed that when the collective-bargaining agreement has expired, the union is entitled to a rebuttable presumption of majority status. An employer may overcome the presumption of majority status by showing that at the time of its refusal to bargain "either (1) the union did not in fact enjoy majority support or (2) the employer had a 'good faith' doubt, founded on a sufficient objective basis of the union's majority." *Auciello Iron Works,* supra at 786–787. There, as well as in this case, the Respondent argued that the latter defense can be raised even after a collective-bargaining contract period has begun to run upon the Union's acceptance of the Employer's offer. The Court, however, held "that the Board reasonably found an employer's precontractual, good-faith doubt inadequate to support an exception of the conclusive presumption arising at the moment a collective bargaining contract offer has been accepted."

The Court further stated that an employer faced with a good-faith doubt has three alternatives, it could have withdrawn the outstanding offer and petition for a representation election, it could have withdrawn the offer and refuse to bargain leaving it to the union to charge the employer with unfair labor practice or it could have withdrawn the offer and to allow it time to investigate the issue. The Respondent, however, did not rely upon any of the three options. It made its offer contingent upon its ability to continue negotiations, and argues that it is not bound by the contract even though the Union's acceptance preceded the Company's confirmed doubt of the Union's majority status. Whether a contingency offer adds in effect a fourth option to those enumerated above and renders an acceptance void once the contingency is met, would be the issue here, had the Respondent expressed such a contingency. The record, however, shows that the Respondent made its offer contingent upon an overly broad and vague notion, i.e., its continued ability to negotiate or to make an offer, without any further elaboration or clarification, leaving the other party in doubt whether such a contingency was met or not. It goes without saying that any offer made assumes the party's continued ability to negotiate or to make an offer. When a company is dissolved or a party dies, it no longer has the ability to negotiate and the capacity to make a contact no longer exists. There are a myriad of possibilities why a party to contract negotiations could loose its ability to negotiate. Any offer so conditioned would permit a party to negotiate a contract with the unilateral option to cancel it based upon a subsequent claim that lacked the ability to negotiate. I, accordingly, find that the Respondent's expressed condition was overly broad and vague and therefore not binding upon the parties. The Company's expression of contingency did not amount to an effective "con-

dition subsequent" to void the contract. In accordance with the decision in *Auciello Iron Works,* supra, I, accordingly, find that the Respondent's refusal to honor and execute the collective-bargaining agreement and its withdrawal of recognition of the Union violated Section 8(a)(1) and (5) of the Act.

The final issue is the Respondent's refusal to furnish the information requested by the Union in its letter dated August 19, 1997, i.e., "the names and dates of all replacement workers . . . hired during the strike of Atlas Concrete" (G.C. Exh. 1,A). The Respondent admitted in its answer its refusal to furnish the requested information (G.C. Exh. 1(S)). The Union explained the need for the information. That information was needed for the Union to assess its bargaining position during the negotiations and to enable the Union to contact the replacement workers to inform them about the union benefits.

It is axiomatic that the Union is entitled to the information, which is reasonably necessary and relevant to the performance of its duties as a collective-bargaining representative. The Respondent has not contested the issue and I find that its failure to furnish the requested information violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Atlas Concrete Construction Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since about August 1, 1994, the Union has been the exclusive collective-bargaining representative of the following unit appropriate for the purposes of collective bargaining:

> All ready mix drivers, batchmen/loader operators, yardmen, conveyor employees, beltmen, mechanics and lead mechanics employed at [Respondent's] Crestwood, Kentucky facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

4. On August 1, 1997, the Union and Respondent reached an agreement on terms and conditions of employment of the unit in a collective-bargaining agreement.

5. The Respondent's failure and refusal to execute and abide by the agreement constitutes a violation of Section 8(a)(1) and (5) of the Act.

6. During the term of the collective-bargaining agreement the Union is entitled to a conclusive presumption of majority status, so that the Company's withdrawal of recognition of the Union constitutes a violation of Section 8(a)(1) and (5) of the Act.

7. The Respondent's failure to provide the information requested by the Union which is necessary for its duties as collective-bargaining agent violates Section 8(a)(1) and (5) of the Act.

8. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in the unfair labor practices, the Employer must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To rectify the Employer's unlawful failure to sign and implement a collective-bargaining agreement, and its withdrawal of recognition, is necessary to order the Employer, upon the Union's request, to reduce to writing, sign, and retroactively implement the collective-bargaining agreement effective August 1, 1997.

The Employer must make whole all employees to whom the aforesaid collective-bargaining agreement applies for any loss of wages and other benefits suffered as a result of the Employer's failure to sign and implement the agreement. Those wages and benefits, if any, shall be computed in accordance with the Board's formula in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, the order will require the Employer to refrain from, in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights which the Act guarantees.

Finally, the Employer will be ordered to post an appropriate notice to employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Atlas Concrete Construction Co., Inc., Crestwood, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of employees in the bargaining unit found appropriate.

(b) Failing and refusing to sign and implement the collective-bargaining agreement which has been found to have been created on August 1, 1997.

(c) Failing and refusing to furnish the information requested by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union the information requested by letter of August 19, 1997.

(b) On the Union's request, reduce to writing, sign, and implement retroactively to August 1, 1997, the collective-bargaining agreement which the Union accepted on that date.

(c) Make whole all employees to whom the August 1, 1997 collective-bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective-bargaining agreement and its withdrawal of recognition from the Union. Moneys due under this make-whole provision are to be computed according to the formulas described in the remedy section above.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to determine the amounts owing under the terms of this Order.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region post at its Crestwood, Kentucky facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition of the Union as the exclusive collective-bargaining representative of employees in the bargaining unit found appropriate.

WE WILL NOT fail and refuse to sign and implement the collective-bargaining agreement, which has been found to have been created on August 1, 1997.

WE WILL NOT fail and refuse to furnish the information requested by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union the information requested by letter of August 19, 1997.

WE WILL on the Union's request, reduce to writing, sign, and implement retroactively to August 1, 1997, the collective-bargaining agreement, which the Union accepted on that date.

WE WILL make whole all employees to whom the August 1, 1997 collective-bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective-bargaining agreement and its withdrawal of recognition from the Union. Moneys due under this make-whole provision are to be computed according to the formulas described in the remedy section above.

ATLAS CONCRETE CONSTRUCTION CO., INC.